

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KELLY FULBRIGHT, et al.,

Plaintiffs,

v.

DAYTON SCHOOL DISTRICT NO.
2, et al.,

Defendants.

CASE NO: 13-CV-0030-TOR

ORDER GRANTING SCHOOL
DEFENDANTS' PARTIAL MOTION
TO DISMISS

BEFORE THE COURT is a motion to dismiss filed by Defendants Dayton School District No. 2, Educational Service District No. 112, Douglas Johnson, and Larry Bush (collectively the "School Defendants") (ECF No. 5). This matter was heard without oral argument on April 5, 2013. The Court has reviewed the motion and the briefing and files herein, and is fully informed.

BACKGROUND

This lawsuit arises from a series of sexual assaults which were perpetrated against Plaintiff A.F. while she was being shuttled to and from a special education

1 placement in a bus operated by Defendant Columbia County Public Transport
2 (“CCPT”). A.F. and her parents, Plaintiffs Kelly and Jeri Fulbright, have sued
3 CCPT, as well as Defendants Dayton School District No. 2, Educational School
4 District No. 112, Douglas Johnson and Larry Bush (collectively the “School
5 District Defendants”) for several causes of action under both state and federal law.

6 In the instant motion, the School Defendants seek dismissal of Plaintiffs’
7 claims for (1) violation of A.F.’s right to be free from unreasonable seizure under
8 the Fourth Amendment; (2) violations of A.F.’s right to substantive due process
9 under the Fourteenth Amendment; (3) Title IX violations asserted by Mr. and Mrs.
10 Fulbright; (4) Title IX violations asserted against Defendants Johnson and Bush in
11 their individual capacities; (5) “reckless and wanton misconduct”; (6) respondeat
12 superior; and (7) violations of the Washington Sexual Exploitation of Children
13 Act. The School Defendants also raise alternative arguments concerning municipal
14 liability, qualified immunity, supervisory liability and standing in opposition to the
15 Plaintiffs’ constitutional claims.

16 FACTS

17 The following facts are drawn from Plaintiffs’ Complaint and are accepted
18 as true for purposes of this motion. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,
19 556 (2007). A.F. is a developmentally delayed and cognitively impaired adult who
20 resides with her parents, Plaintiffs Kelly and Jeri Fulbright, in Dayton,

1 Washington. A.F. has a Full Scale Intelligence Quotient (“IQ”) of approximately
2 40 and functions at the level of a seven year-old child. As a result of her
3 impairments, A.F. suffers from significantly reduced problem-solving abilities.

4 A.F. first enrolled in the Dayton School District No. 2 (“School District”) in
5 the fall of 1998. Shortly thereafter, A.F. was identified as a special needs student.
6 With input from the Fulbrights, the School District created a special education
7 program which focused on improving A.F.’s communication and academic skills.
8 For the next several years, A.F. attended school without incident.

9 In November 2010, the School District and the Fulbrights agreed that A.F.
10 would benefit from educational experiences geared toward developing work skills.
11 To that end, the School District arranged for A.F. to participate in a “sheltered
12 work experience” during school hours. This placement was located in Walla
13 Walla, Washington, approximately 35 miles away from A.F.’s home in Dayton.
14 Thus, the School District and its special education services provider, Educational
15 Services District No. 112 (“ESD 112”),¹ arranged for A.F. to be transported to and
16 from her placement on a bus operated by CCPT.

17
18 ¹ The Complaint inaccurately refers to this entity as Educational School District
19 No. 112, a fact that can be corrected by an amended complaint. *See* ECF No. 5 at
20 2.

1 For approximately two months, A.F. rode the transit bus to and from Walla
2 Walla accompanied by a para-educator. In mid-September 2011, however, the
3 School District determined that it could no longer afford the expense of having the
4 para-educator travel with A.F. Over the Fulbrights' objection, the School District
5 reassigned the para-educator, and A.F. began riding the bus alone.

6 On or about December 11, 2011, a CCPT official discovered from
7 watching security videos that A.F. had been bothered by a male passenger while
8 riding the bus. The official notified Mr. Fulbright of the incident via telephone and
9 indicated that the passenger's behavior was inappropriate. The official also
10 assured Mr. Fulbright that CCPT would take immediate action to keep his daughter
11 safe. CCPT subsequently issued a memorandum to its drivers indicating that the
12 drivers were responsible for ensuring that the male passenger did not sit next to, in
13 front of, behind, or adjacent to A.F. The memorandum further advised drivers to
14 ensure that A.F. was not bothered while riding the bus.

15 After being informed of the December 11 incident, Mr. Fulbright
16 complained to the School District's Director of Special Education, Defendant
17 Larry Bush ("Bush"), that A.F. had been "sexually harassed" while riding the bus.
18 ECF No. 1 at ¶ 5.18. He further demanded that Bush and the School District
19 "ensure that A.F. was never again left to defend herself from sexually
20 inappropriate behavior" while traveling on the bus. ECF No. 1 at ¶ 5.18. Bush

1 assured Mr. Fulbright that CCPT had resolved the “issue” and advised him that no
2 further corrective or preventative action was necessary. ECF No. 1 at ¶ 5.18.

3 In mid-January 2012, A.F. was subjected to a series of sexual assaults at the
4 hands of a male passenger named Colton Langworthy.² The assaults continued
5 until a female passenger informed the CCPT bus driver, Defendant Karen Zink
6 (“Zink”), that she was concerned about Langworthy’s conduct. After receiving
7 this report, Zink advised A.F. to tell her parents if something was bothering her.
8 Later that same day, A.F. informed her mother that she had been sexually
9 assaulted. The Fulbrights immediately notified law enforcement, which in turn
10 notified the School District’s Superintendent, Defendant Douglas Johnson
11 (“Johnson”). A subsequent review of security videos revealed that A.F. was
12 forcibly molested on at least six separate occasions, including one incident in
13 which Langworthy unzipped A.F.’s pants and touched her between her legs.

14 After experiencing the assaults, A.F. began to exhibit signs of “regression,”
15 including persistent crying, excessive scratching, obsessive worrying, frequent
16 nightmares, and an aversion to being alone. A mental health counselor
17 subsequently diagnosed A.F. with acute stress disorder and prescribed medication

18
19 ² The Complaint does not specify whether Mr. Langworthy is the same male
20 passenger who CCPT had previously identified from the bus surveillance video.

1 to treat her symptoms of anxiety and depression. According to the Complaint,
2 “[A.F.’s] psychological profile remains guarded.” ECF No. 1 at ¶ 5.25.

3 DISCUSSION

4 A motion to dismiss “tests the legal sufficiency of a [plaintiff’s] claim.”
5 *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). To survive such a motion, a
6 complaint must contain “enough facts to state a claim to relief that is plausible on
7 its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “Naked
8 assertion[s],” “labels and conclusions,” or “formulaic recitation[s] of the elements
9 of a cause of action will not do.” *Id.* at 555, 557. “A claim has facial plausibility
10 when the plaintiff pleads factual content that allows the court to draw the
11 reasonable inference that the defendant is liable for the misconduct alleged.”
12 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Although the plausibility standard is
13 not akin to a probability requirement, “it asks for more than a sheer possibility that
14 a defendant has acted unlawfully.” *Id.*

15 In addition, Federal Rule of Civil Procedure 8(a)(2) requires that a
16 complaint contain a “short and plain statement of the claim showing that the
17 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). This standard “does not
18 require ‘detailed factual allegations,’ but it demands more than an unadorned, the
19 defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678 (quoting
20 *Twombly*, 550 U.S. at 555). In assessing whether Rule 8(a)(2) has been satisfied, a

1 court must first identify the elements of the plaintiff's claim(s) and then determine
2 whether those elements could be proven on the facts pled. Although the court
3 should generally draw reasonable inferences in the plaintiff's favor, *see Sheppard*
4 *v. David Evans and Assocs.*, 694 F.3d 1045, 1051 (9th Cir. 2012), it need not
5 accept "naked assertions devoid of further factual enhancement." *Iqbal*, 556 U.S.
6 at 678 (internal quotations and citation omitted).

7 In ruling upon a motion to dismiss, the court must accept the factual
8 allegations in the complaint as true and construe the pleadings in the light most
9 favorable to the party opposing the motion. *Sprewell v. Golden State Warriors*,
10 266 F.3d 979, 988 (9th Cir. 2001). The court may disregard allegations that are
11 contradicted by matters properly subject to judicial notice or by exhibit. *Id.* The
12 court may also disregard allegations that are "conclusory" or are the product of
13 unreasonable deductions and inferences. *Id.*

14 The Ninth Circuit has repeatedly instructed district courts to "grant leave to
15 amend even if no request to amend the pleading was made, unless . . . the pleading
16 could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203
17 F.3d 1122, 1130 (9th Cir. 2000). The standard for granting leave to amend is
18 generous—the court "should freely give leave when justice so requires." Fed. R.
19 Civ. P. 15(a)(2). In determining whether leave to amend is appropriate, a court
20 must consider the following five factors: bad faith, undue delay, prejudice to the

1 opposing party, futility of amendment, and whether the plaintiff has previously
2 amended the complaint. *United States v. Corinthian Colleges*, 655 F.3d 984, 995
3 (9th Cir. 2011).

4 **A. Fourth Amendment Claim**

5 Plaintiffs allege that Defendants Johnson and Bush violated A.F.'s Fourth
6 Amendment right to be free from unreasonable seizure by requiring her to ride the
7 CCPT bus unaccompanied. According to Plaintiffs, requiring A.F. to make the 70-
8 mile roundtrip commute from Dayton to Walla Walla without a chaperone was
9 manifestly "unreasonable under the circumstances." ECF No. 6 at 6.

10 This claim fails because A.F. was not "seized" while she rode the bus. A
11 Fourth Amendment seizure entails "a restraint on liberty to the degree that a
12 reasonable person would not feel free to leave." *Doe ex rel. Doe v. Hawaii Dep't*
13 *of Educ.*, 334 F.3d 906, 909 (9th Cir. 2003). Plaintiffs have not alleged that A.F.'s
14 liberty was restrained at all, let alone restrained to the degree that a reasonable
15 person in her position would not have felt free to leave. Because there do not
16 appear to be any facts from which Plaintiffs could establish a Fourth Amendment
17 seizure, this claim is dismissed with prejudice.

18 **B. Substantive Due Process Claims (Deliberate Indifference)**

19 As a general rule, the Fourteenth Amendment "typically does not impose a
20 duty on the state to protect individuals from third parties." *Patel v. Kent Sch. Dist.*,

1 648 F.3d 965, 971 (9th Cir. 2011) (internal quotation and citation omitted). One
2 exception to this rule is the so-called “state-created danger” exception, which
3 applies to situations in which a state actor “affirmatively places the plaintiff in
4 danger by acting with deliberate indifference to a known and obvious danger.” *Id.*
5 at 971-72 (internal quotations and citation omitted). To state a claim under this
6 theory, a plaintiff must allege (1) an affirmative act which placed the plaintiff in
7 danger; and (2) deliberate indifference to a known and obvious danger. *Id.* at 974.
8 Only the second element is at issue in the instant motion.

9 As the Ninth Circuit explained in *Patel*, “deliberate indifference” is a very
10 high standard of fault. Unlike gross negligence, deliberate indifference “requires a
11 culpable mental state.” 648 F.3d at 974. “The state actor must recognize an
12 unreasonable risk and *actually intend* to expose the plaintiff to such risks without
13 regard to the consequences.” *Id.* (emphasis added) (quotation omitted). In other
14 words, the defendant must “know[] that something *is* going to happen” and
15 affirmatively expose the plaintiff to the risk. *Id.* (bold emphasis added).

16 The School Defendants argue that *Patel* mandates dismissal of A.F.’s
17 deliberate indifference claims because the facts of that case are “more egregious”
18 than those alleged in the Complaint. ECF No. 5 at 8. While *Patel* is clearly
19 analogous, a qualitative comparison of its facts is not particularly helpful at this
20 juncture. On a motion to dismiss, a court must decide whether the facts pled in a

1 complaint state a *plausible* claim for relief. *Iqbal*, 556 U.S. at 678. Whether the
2 conduct alleged is “egregious enough” to violate the law is generally a question to
3 be decided on summary judgment or by the finder of fact at trial. At this early
4 stage of the proceedings, the Court must merely decide whether the claim has
5 facial plausibility, that is, whether plaintiffs have pleaded sufficient factual content
6 that allows the court to draw the reasonable inference that the defendants are liable
7 for their deliberate indifference to a recognized risk.

8 The Court finds that Plaintiffs have failed to state a claim on the facts pled in
9 the Complaint. Plaintiffs have not alleged that the Defendants recognized an
10 unreasonable risk that A.F. would be *sexually assaulted* and that they *actually*
11 *intended* to expose her to that risk. *See Patel*, 648 F.3d at 974. The facts alleged,
12 when viewed in the light most favorable to the Plaintiffs, merely establish (1) that
13 CCPT informed Mr. Fulbright that a male passenger had bothered A.F. on one
14 prior occasion; (2) that CCPT drivers were notified to prevent the male passenger
15 from bothering A.F.; (3) that Mr. Fulbright informed Defendant Bush that A.F. had
16 been sexually harassed; (4) that Mr. Fulbright demanded that Defendant Bush
17 ensure that A.F. was never again left to defend herself from sexually inappropriate
18 behavior; and (5) Defendants failed to prevent a sexual assault from occurring.
19 While these allegations may constitute gross negligence, they do not rise to the
20 “markedly higher” standard of deliberate indifference. *See id.* at 976. At bottom,

1 the facts pled in the Complaint do not give rise to a plausible inference that
2 Defendants recognized the magnitude of the risk (*i.e.*, that A.F. might be sexually
3 assaulted as opposed to bothered), or that Defendants actually intended to expose
4 A.F. to such a risk without regard to the consequences. *See id.* at 974.

5 Accordingly, Plaintiffs' deliberate indifference claims are dismissed with leave to
6 amend within fourteen (14) days of the date of this Order.

7 **C. Claims for Deprivation of Parental Relationship**

8 The School Defendants have moved to dismiss all § 1983 claims asserted by
9 Mr. and Mrs. Fulbright on the ground that the constitutional rights at issue are
10 personal to A.F. The Fulbrights acknowledge that they cannot recover for
11 violations of A.F.'s constitutional rights, but indicate that they wish to assert
12 separate claims for violations of their constitutional right to a parental relationship
13 with their daughter. ECF No. 6 at 15-17. Although the Complaint does not list a
14 violation of the Fulbrights' parental rights as a distinct claim, it does allege facts
15 which, if proven, could constitute a violation of those rights. Accordingly, the
16 Court will grant Plaintiffs leave to amend the Complaint to reference a distinct
17 § 1983 claim for violation of the Fulbrights' parental rights. To the extent that the
18 Fulbrights have asserted claims which are derivative of A.F.'s constitutional rights,
19 those claims are dismissed with prejudice.

20 //

1 **D. Title IX Claims**

2 Title IX of the Education Amendments of 1972 provides that, “[n]o person
3 in the United States shall, on the basis of sex, be excluded from participation in, be
4 denied the benefits of, or be subjected to discrimination under any education
5 program or activity receiving Federal financial assistance . . .” 20 U.S.C.

6 § 1681(a). Title IX’s right to be free of discrimination on the basis of sex is
7 enforceable through an implied private right of action, and damages are available
8 as a remedy. *See Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 65 (1992).

9 The Supreme Court has held that, under certain circumstances, recipients of federal
10 funds may be held liable under Title IX for student-on-student sexual harassment.

11 *See Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999).

12 1. The Fulbrights’ Title IX Claims

13 A parent of a student subjected to sexual misconduct does not have standing
14 to assert a *personal* claim under Title IX. *See Rowinsky v. Bryan Ind. Sch. Dist.*,
15 80 F.3d 1006, 1010 (5th Cir. 1996) (concluding parent did not have standing to
16 assert a personal claim under Title IX), *disapproved on other grounds by Davis v.*
17 *Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 637-38 (1999); *Seiwert v. Spencer-Owen*
18 *Cnty. Sch. Corp.*, 497 F. Supp. 2d 942, 954 (S.D. Ind. 2007) (“[I]t is apparent from
19 the language of Title IX that a parent lacks standing to bring a cause of action in
20 their individual capacity based on Title IX.”); *Doe v. Oyster River Co-Op. Sch.*

1 *Dist.*, 992 F. Supp. 467, 481 (D. N.H. 1997) (dismissing mother’s Title IX claim
 2 under 12(b)(6) on grounds that “only participants of federally funded programs—
 3 and not the participants’ parents—have standing to bring claims under Title IX.”).
 4 Because the Fulbrights’ Title IX claims lack a cognizable legal theory, they are
 5 dismissed with prejudice.

6 2. Title IX Claims Against Bush and Johnson

7 Plaintiffs allege Title IX claims against individual Defendants Bush and
 8 Johnson. Title IX’s implied right of action reaches only the institution that
 9 receives federal funding. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257
 10 (2009). The statute “has consistently been interpreted as not authorizing suit
 11 against school officials, teachers and other individuals.” *Id.* (citation omitted); *see*
 12 *also Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1576 (N.D. Cal. 1993)
 13 (“[I]ndividuals may not be held personally liable under Title IX.”); *Roe ex rel.*
 14 *Callahan v. Gustine Unified Sch. Dist.*, 678 F. Supp. 2d 1008, 1024 (C.D. Cal.
 15 2009) (granting summary judgment in favor of defendants sued in their individual
 16 capacities under Title IX). Accordingly, the Title IX claims against Defendants
 17 Bush and Johnson in their individual capacities are dismissed with prejudice.

18 **E. Reckless and Wanton Misconduct**

19 Plaintiffs appear to have alleged “reckless and wanton misconduct” as a
 20 separate cause of action. *See* ECF No. 1 at ¶¶ 6.26-6.28. Reckless and wanton

1 misconduct, however, is not a separate cause of action under Washington common
2 law. *Rodriguez v. City of Moses Lake*, 158 Wash.App. 724, 730-31 (2010). To the
3 extent that Plaintiffs allege reckless and wanton misconduct as a separate cause of
4 action, the claim is dismissed.

5 **F. Respondeat Superior**

6 Plaintiffs appear to have alleged respondeat superior as a separate cause of
7 action. *See* ECF No. 1 at ¶ 6.37. Respondeat superior, however, is a theory of
8 liability rather than a separate cause of action. *See Hollinger v. Titan Capital*
9 *Corp*, 914 F.2d 1564, 1576-77 n. 28 (9th Cir. 1990). Again, to the extent that
10 Plaintiffs allege respondeat superior as a separate cause of action, the claim is
11 dismissed. Plaintiffs may, of course, rely upon this theory to establish vicarious
12 liability.

13 **G. Sexual Exploitation of Children Act Claim**

14 Plaintiffs allege that Colton Langworthy's actions violated the Sexual
15 Exploitation of Children Act ("SECA"), and that his actions arose from
16 Defendants' misconduct. ECF No. 1 at ¶¶ 6.37-6.41. Under SECA, sexual
17 exploitation of a minor occurs when a person compels, aids, or permits a minor to
18 engage in "sexually explicit conduct." *See* RCW 9.68A.011(4), 040. A minor is
19 defined as any person under the age of eighteen. RCW 9.68A.011(5).

1 A.F. turned eighteen on December 15, 2011. ECF No. 6 at 20. Thus, any
2 incidents which occurred after this date, including the sexual assaults by Colton
3 Langworthy which began on January 12, 2012, cannot form the basis of a valid
4 SECA claim. Any SECA claim stemming from post-December 15, 2011 conduct
5 is dismissed with prejudice.

6 The only incident which is alleged to have occurred prior to A.F.'s eighteenth
7 birthday is the purported "sexual harassment" or "bothering" of A.F. discovered on
8 December 11, 2011. ECF No. 1 at ¶ 5.16. However, "sexual harassment" does not
9 qualify as "sexually explicit conduct" within the meaning of RCW 9.68A.011(4).
10 In an abundance of caution, the Court will dismiss any claim stemming from this
11 incident with leave to amend within fourteen (14) days of the date of this Order.

12 **ACCORDINGLY, IT IS HEREBY ORDERED:**

13 The School Defendants' Partial Motion to Dismiss (ECF No. 5) is
14 **GRANTED.** The following causes of action are dismissed with prejudice:

- 15 (1) Fourth Amendment unreasonable seizure claim;
16 (2) Title IX claims asserted by Plaintiffs Kelly and Jeri Fulbright;
17 (3) Title IX claims asserted against Defendants Douglas Johnson and Larry
18 Bush in their individual capacities;
19 (4) claim for reckless and wanton misconduct;
20 (5) claim for respondeat superior; and

1 (6) SECA claims stemming from post-December 15, 2011 conduct.

2 The following claims are dismissed with leave to amend within fourteen (14) days
3 of the date of this Order:


4 (1) substantive due process (deliberate indifference) claims; and

5 (2) SECA claim stemming from pre-December 15, 2011 conduct.

6 The District Court Executive is hereby directed to enter this Order and
7 provide copies to counsel.

8 **DATED** April 10, 2013.




THOMAS O. RICE
United States District Judge